APPENDIX

(Excerpts from the Court of Criminal Appeals' Decision)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
March 12, 2002 Session

STATE OF TENNESSEE v. RICHARD ODOM, a/k/a OTIS SMITH

Direct Appeal from the Criminal Court for Shelby County
No. 91-07049 Chris Craft, Judge

No. W2000-02301-CCA-R3-DD - Filed October 15, 2002

[Deleted: Introductory Paragraph]

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and NORMA MCGEE OGLE, J., joined.

Robert C. Brooks (at trial and on appeal) and Edward Chandler (at trial), Memphis, Tennessee, for the appellant, Richard Odom.

Paul G. Summers, Attorney General and Reporter; Mark E. Davidson, Assistant Attorney General; William L. Gibbons, District Attorney General; and Phillip Gerald Harris and Amy Weirich, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

[Deleted: Procedural History, Facts, and Testimony]

[Deleted: I. Failure of Indictment of Allege Capital Offense]

[Deleted: II. Denial of Continuance to Complete Psychiatric and Neuropsychological Testing, except for Trial Court Order of October 12, 1999]

This cause came on to be heard on the various *ex parte* motions filed by defendant, and the record as a whole,

FROM ALL OF WHICH THE COURT FINDS that defendant's case was remanded back to this Court for resentencing after the State's petition to rehear was denied October, 1996, and was set for resentencing on January 27, 1997, by agreement of all parties. On December 20, 1996, this Court granted a continuance at the request of the state, the defendant's attorneys, and the defendant, acting *pro se*, and because a conflict of interest had arisen between defendant and the Office of the Public Defender. The circumstances of this conflict are set out in this Court's order entered June 4, 1997, continuing the resentencing hearing, relieving his former attorneys of representation and appointing his present attorneys, Robert Brooks and Ed Chandler. Not set out in that order, as the matter was heard *ex parte*, was the request of defendant's assistant public defenders that they needed a continuance because they had not had time to find an expert who would testify in mitigation concerning the defendant's mental condition. Filed in the original court jacket of this case is a report by the Mississippi State Hospital of the results of their evaluation of defendant in 1978 that "It was the unanimous opinion of the professional staff of the forensic unit that Mr. Odom was without psychosis, responsible and competent to stand trial[.]" . . . Dr. John Hutson had also been privately hired by the Public Defender's Office to examine the defendant for purposes of mitigation in his original trial, and although this Court has not been made privy to the report of his examination, he did testify in defendant's first sentencing hearing that he examined the defendant May 19th, 1991, May 31, 1991, December 30, 1991, April 10, 1992, and during defendant's original trial. Although the trial judge in that first trial committed reversible error in not allowing Dr. Hutson to testify to defendant's social history, the defense never attempted to ask him about any mental problems he might have found in his examination of the defendant. He read from his findings from his examination on cross-examination, however, that

> In regards to his sanity at the time of his alleged offense Mr. Odom has never been diagnosed with any significant psychiatric disorder, such as would be likely to impair his ability to appreciate the wrongfulness of his actions, or to impair his ability to conform his behavior to the requirements of the law. He likely can be diagnosed as a personality disorder, but that is not particularly relevant to his defense. Furthermore, his description of his behavior just prior to and at the time of his alleged actions on or about 10 May, 1991, although indicative of some desperation with regard to finding food and shelter, does not indicate any significant impairment of his abilities.

. . . He had also indicated in his evaluation and report that there "appears to be a paucity of mitigating circumstances." On remand, defendant's resentencing attorneys therefore asked this Court in chambers to grant them

funds to hire another expert, which this Court stated would be granted when the expert was chosen, and a proper motion and affidavit were filed. This expert had not been found by the December 20, 1996, motion hearing, and was an additional reason this Court granted the continuance of the January 27, 1997 resentencing hearing, as the defense needed additional time.

After new attorneys were appointed in the above-mentioned June 4, 1997 order, defendant filed on August 1, 1997, a "Motion to Set Resentencing," suggesting a resentencing date of December 1997 or January 1998, to give the attorneys several months to "conduct such further investigation as is necessary and to adequately prepare for the defendant's resentencing proceeding," which was granted. Due to the failure of the defendant to return from the State of Mississippi because of repeated resets of his murder retrial in that state, this Court was compelled to reset defendant's Tennessee retrial, and set a status report date of November 3, 1997, and then February 6, 1998.

In January and February of 1998, defendant filed *ex parte* motions for a mitigation specialist, a psychologist, a "jury selection and trial consultant," and a research assistant for a motion for change of venue. This Court granted the motion as to the mitigation specialist, Gloria Shettles, and entered a written order to that effect June 29, 1998. The motion for the jury consultant/research assistant was denied, as there was no showing of particularized need. *State v. Black*, 815 S.W.2d 166, 179-80 (Tenn. 1991). This Court also felt there would be no problem with pretrial publicity. In the pretrial jury questionnaire and individual voir dire on pretrial publicity administered at the resentencing hearing, only one juror, a television news reporter, was exposed to any prejudicial pretrial publicity, and she was excused for cause.

The motion for a psychologist stated that "Counsel has recently learned of possible indications in the defendant's behavior of an intermittent explosive disorder" due to a prison guard's telling counsel that the defendant had a violent temper. It was also supported by an affidavit from Dr. John Hutson, defendant's original psychologist, who referenced the 1978 Mississippi exam and his own exam of defendant in 1991, and stated he felt a new exam was warranted, as 7 years had passed since the original trial. He did not, however, note any finding at any time of any new mental problems possessed by the defendant. This Court told defendant's attorneys the motion would be granted once a psychologist was chosen and the proper motion and affidavits were filed. Between further status dates of February 27, 1998, March 26, 1998, May 29, 1998, and August 28, 1998, this Court received nothing from defendant requesting any funds for any mental health experts or examinations. Defendant was again convicted of the 1978 murder in Mississippi in July of 1998. This Court, on August 28, 1998, set an additional status report date for November 30, 1998, giving defendant an

additional four months to complete any investigation necessitated by the Mississippi murder retrial and conviction, which the state was using as an aggravating circumstance. During this additional four month delay nothing was heard from defendant's attorneys *ex parte* regarding funds for a psychologist. On November 30, 1998 the resentencing hearing was then set for retrial May 10, 1999, by agreement of all parties, giving defendant more than 5 additional months to complete any needed mitigation investigation. Motions were heard February 26, 1999, and this Court allowed *ex parte* funds that same day for copies of pleadings from two other capital cases recently tried. No mention was made during these discussions of a need for a psychologist, and this Court assumed that since 10 months had passed since the *ex parte* request for a psychologist, the defense was not going to proceed with a mental defense, given the lack of any support for one in the pleadings and record before this Court.

On March 2, 1999, a "Motion for Continuance of Jury Trial Set May 10, 1999," was filed by the defendant. An additional "Motion to Continue Motion Hearing and Jury Trial" was filed March 25, 1999, by the defendant. At the hearing on these two motions for continuance, defendant's attorneys revealed in open court that their mitigation expert, Gloria Shettles, for which this Court had allowed funds *ex parte*, had not completed the mitigation investigation, and that the attorneys had just recently discovered this fact, and could not be ready for trial May 10th. The State, understandably aggrieved, objected to the continuance and asked this Court to order the defendant to reveal the nature of the mitigation proof so that the State would not be handicapped in opposing the motions for continuance. This Court denied this request, granting over the State's strenuous objection the motions to continue, resetting the resentencing hearing for September 27, 1999, to give the defense more than five additional months to prepare.

After the continuance was granted, another *ex parte* motion for a psychiatrist was filed April 23, 1999, requesting Dr. Kenner, a Nashville expert, and a supplemental motion requested a spinal tap of the defendant and a serotonin study by Dr. Rossby, also from Nashville. These were both granted in orders entered by this Court on April 27, 1999, approved by Chief Justice Riley Anderson, and returned to this Court June 15, 1999. Also approved were additional funds for Gloria Shettles. Other motions were filed and heard May 28, 1999. This Court also approved in *ex parte* hearings a spinal tap of the defendant on July 15, 1999, an Order for Jail Records on August 6, 1999, funds for a transcript of the Mississippi trial on August 30, 1999, and funds for a glucose tolerance test on September 16, 1999.

On August 10, 1999, another motion for continuance was filed by the defendant, stating that a mitigation witness (later found to be Gloria Shettles) had a conflict with the September 27th date. In discussing a

hearing date on the motion in court with Mr. Brooks, he informed me that only a one week continuance would be requested, and I asked him to get with Mr. Harris (one of the prosecutors) and agree on a date to hear the motion as soon as possible. This motion was then withdrawn by defendant off the record, during a conversation between Mr. Brooks and Mr. Harris, in which Mr. Brooks told Mr. Harris to inform me that the motion would be withdrawn and would not need a hearing date, as the witness conflict had been resolved. This Court was so informed, and this motion is hereby shown withdrawn. No mention was ever made at any time during these discussions that the defense might not otherwise be ready for trial.

Mr. Brooks next came to see me in chambers on September 14, 1999, less than two weeks before trial date, with an *ex parte* written request for expert services to be performed beginning November 1, 1999, which stated that "Dr. Kenner has requested that a neuro-psychological evaluation of the defendant be performed by Dr. Pamela Auble . . . in order that he may complete his evaluation." This request was being made almost five months after the order was entered for funds for Dr. Kenner, and three months after receipt of those approved orders from the Supreme Court. I denied that request, stating that there could be no specialized need for services performed November 1st, as that would be after the resentencing hearing, which was to begin September 27th. Defendant then filed another Motion for Continuance on September 16, 1999, which was heard that same day, and denied. This Court finds that defendant's attorneys have been given more than enough time to prepare a mitigation defense. Although the delay of the resentencing from the first setting of January 27, 1997, was in part caused by the defendant's being in Mississippi, there is absolutely no excuse for the mitigation investigation not to have been completed during this period of time, prior to November 30, 1998. The defendant had different attorneys appointed to represent him in Mississippi, and that trial in no way prevented his present attorneys from their trial preparation of his Tennessee resentencing hearing. After defendant's conviction in Mississippi in July, 1998, he was returned to Tennessee, and had an additional 4 months to prepare for his status report date of November 30, 1998. After November 30th, he was granted an additional 5 months to prepare before his resentencing hearing, set May 10, 1999. Because this Court felt constitutionally compelled to grant yet another continuance of the May 10 resentencing hearing, as the attorneys admitted on the record their mitigation investigation was still not complete, this Court gave them an additional 5 months from the granting of the continuance until the new date of September 27, 1999. This period of time is much more than sufficient to have prepared any mitigation defense, no matter how involved, intricate or complex.

This Court also considered the nature of the expert services requested, a neuro-psychological exam, and felt that defendant could have those services performed prior to September 27th by someone else. The day after

the September 16th motion for continuance was denied, this Court in fact entered an *ex parte* order at the request of the defense authorizing the neuro-psychological evaluation, to be performed immediately by a Dr. Alison Kirk in Nashville.

On September 22, 1999, the defendant filed yet another motion to continue, *ex parte*, which stated that after Dr. Kirk talked to Dr. Kenner, she changed her mind about performing the evaluation. This motion was supported by an affidavit from Dr. Kenner that stated that unless this evaluation were done (presumably by Dr. Auble) he could not in good conscience continue his work on defendant's case. This motion was argued in open court, as this Court cannot hear motions to continue *ex parte*, with the State being present, but not being allowed to see the motion. This Court denied that motion, for the reasons stated on the record at the time, stating also that the Court would enter this order additionally setting out *ex parte* reasons. There is still nothing on the record that would support any mental illness or defect possessed by the defendant which could be used in mitigation, and the nature of the additional services requested, for which the continuance was sought, are merely exploratory in nature. Although the defense desires that these services be performed, a showing of particularized need for funds for these services has not been shown, and they are not so material to mitigation that "the failure to grant a continuance denied defendant a fair trial or that it could be reasonably concluded that a different result would have followed had the continuance been granted." *State v. Hines*, 919 S.W.2d 573, 579 (Tenn. 1995).

On September 23rd, 1999, another *ex parte* motion was filed, seeking this Court to authorize additional funds for Dr. Kenner to travel to Memphis to testify, supported by an affidavit from Dr. Kenner signed September 21st, which shows 2½ hours of examination of the defendant and 7½ hours review of records, and a bill for $2,000. He asked for an additional $10,000 limit to travel to Memphis and testify, although stating no conclusions that he found anything concerning the defendant's mental state the defendant could use in mitigation. This Court, in deference to the right of the defendant to put on mitigation, authorized the funds.

On the day of trial, the defense informed this Court in open court that Dr. Kenner was refusing to come to Memphis to testify, because this Court would not allow a continuance so that Dr. Auble could perform additional tests. This Court, feeling that it should not allow the Criminal Justice System to be held hostage by a psychiatrist, offered to compel the attendance of Dr. Kenner, which offer was declined by the defense, presumably because Dr. Kenner would have had nothing to offer. The *ex parte* order previously entered on April 27, 1999, authorizing funds for Dr. Kenner is therefore rescinded, and it is hereby ordered that Dr. Kenner not be reimbursed by the Administrative Office of the Courts for any services performed by him in

connection with this case, due to his willful refusal to testify in defendant's resentencing hearing.

This Court has done everything in its power to allow the defendant to produce every bit of proof he could muster in his resentencing, allowing many continuances over a period of two years and eight months from the first resentencing hearing set January 27, 1997, and has allowed funds for numerous experts whenever requested. The defendant had a fair trial and presented an effective, although not victorious, defense. To have permitted yet another continuance to allow the defendant to conduct last minute exploratory examinations, for which no basis had been shown in the record, at the last minute whim of a petulant expert witness, would have been in this Court's opinion extremely improper, and would be a gross abuse of the judicial process.

[Deleted: III. Sentencing Pursuant to Statute in Effect at Time of Offense]

[Deleted: IV. Introduction of Photographs of Homicide Victims]

V. Denial of Defendant's Motion to Allow Jury to Return Sentence of Life Without Parole

In 1993, the General Assembly amended the capital sentencing statutes to provide for the sentence of life imprisonment without the possibility of parole. State v. Keen, 31 S.W.3d 196, 213 (Tenn. 2000) (citing 1993 Tenn. Pub. Acts ch. 473), cert. denied, 532 U.S. 907, 121 S. Ct. 1233, 149 L. Ed. 2d 142 (2001). Prior to 1993, the only punishments available for a person convicted of first degree murder were life imprisonment and death. See id.; State v. Cauthern, 967 S.W.2d 726, 735 (Tenn.), cert. denied, 525 U.S. 967, 119 S. Ct. 414, 142 L. Ed. 2d 336 (1998). In Keen, our supreme court held that neither the state nor federal constitution required that a jury be allowed to consider life without parole for offenses committed prior to July 1, 1993. 31 S.W.3d at 217 n.7.

The defendant's offense was committed in 1991, over two years before the passage of the 1993 Act, and his resentencing hearing was conducted six years after the Act's effective date. He asserts that he was constitutionally entitled to have the jury provided the option of imposing a sentence of life without the possibility of parole, and that the legislature's action in limiting the application of the 1993 Act to crimes committed on or after July 1, 1993, violates both federal and state constitutions. However, the defendant acknowledges that these arguments have been rejected by our supreme court in Keen, 31 S.W.3d at 213-19. Since this court is bound by the precedent established by our supreme court, we find it unnecessary to review the propriety of its holdings. This claim is without merit.

VI. Death Penalty Violates United States Treaties and International Law

The defendant asserts on appeal that Tennessee's imposition of the death penalty violates the following treaties of the United States: the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. By his argument, the disregard of these treaties violated the Supremacy Clause of the United States Constitution. These claims are based upon two primary grounds: (1) customary international law and specific international treaties prohibit capital punishment; and (2) customary international law and specific international treaties prohibit reinstatement of the death penalty once it has been abolished. In his reply brief, the defendant presents the additional claim that the State's response, that the United States became a party to these treaties "with reservations" that capital punishment still could be imposed, is without merit because the United States Constitution does not permit such reservations.

Initially, we note that the defendant has cited no decision of any court accepting his arguments that, because of treaty obligations of the United States, the death penalty cannot be imposed in this country. In fact, the Sixth Circuit Court of Appeals, in Buell v. Mitchell, 274 F.3d 337 (6th Cir. 2001), dismissed similar claims that the Ohio death penalty scheme violated both international laws and treaties. In Buell, as in the present case, the defendant argued that Ohio's death penalty statute violated the Supremacy Clause by not complying with (1) the American Declaration of the Rights and Duties of Men and (2) the International Covenant on Civil and Political Rights and that "the prohibition of executions is not only a customary norm of international law, but rather, a peremptory norm of international law, or *jus cogens*, that is accepted and recognized by the international community and that cannot be derogated." Id. at 370 (citations omitted).

The court rejected the defendant's contention that "the abolition of the death penalty has been accepted by international agreement and as a form of customary law," id. at 371, finding (1) to the extent that the agreements relied upon by the defendant ban cruel and unusual punishment, the United States had included express reservations preserving the right to impose the death penalty within the limits of the United States Constitution, and (2) the agreements were not binding on courts of the United States. Id. at 372. In so holding, the court reasoned:

> These agreements [the American Declaration of the Rights and Duties of Men and the International Covenant on Civil and Political Rights] do not prohibit the death penalty . . . . Moreover, the United States has approved each agreement with reservations that preserve the power of each of the several states and of the United States, under the Constitution.
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> Neither the OAS Charter [Charter of the Organization of American States] nor the American Declaration specifically prohibit capital punishment. See State v. Phillips, 656 N.E.2d 643, 671 (Ohio 1995). Furthermore, the United States Senate approved the OAS Charter with the reservation that "'none of its provisions shall be considered as . . . limiting the powers of the several states . . . with respect to any matters recognized under the Constitution as being within the reserved powers of the several

> states.'" Charter of the Organization of American States, 1951, 2 U.S.T. 2394, 2484.
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> The International Covenant . . . does not require its member countries to abolish the death penalty. Article 7 of the International Covenant prohibits cruel, inhumane, or degrading punishment. . . . The United States agreed to abide by this prohibition only to the extent that the Fifth, Eighth, and Fourteenth Amendments ban cruel and unusual punishments. See 138 Cong. Rec. S-4781-01, S4783 (1992) ("That the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."); see also Jamison v. Collins, 100 F. Supp. 2d 647, 766 (S.D. Ohio 2000) (citing Christy A. Short, Comment, *The Abolition of the Death Penalty*, 6 Ind. J. Global Legal Stud. 721, 725-26, 730 (1999)).
>
> Moreover, the International Covenant specifically recognizes the existence of the death penalty. . . .
>
> Finally, we note that even if the agreements were to ban the imposition of the death penalty, neither is binding on federal courts. "Courts in the United States are bound to give effect to international law and to international agreements, except that a 'non-self-executing' agreement will not be given effect as law in the absence of necessary authority." Restatement (Third) of Foreign Relations Law § 111 (1987). Neither the American Declaration nor the International Covenant is self-executing, nor has Congress enacted implementing legislation for either agreement. See Garza v. Lappin, 253 F.3d 918, 923 (7th Cir. 2001) (stating that the "American Declaration . . . is an aspirational document which . . . did not on its own create any enforceable obligations on the part of any of the OAS member nations"); Beazley v. Johnson, 242 F.3d 248, 267-68 (5th Cir. 2001) (citing cases and other sources indicating that the International Covenant is not self-executing); Hawkins, 33 F. Supp. 2d at 1257 (noting that Congress has not enacted implementing legislation for the International Covenant).

Buell, 274 F.3d at 371-72.

As in the present case, the defendant in Buell also asserted that Ohio's death penalty violated customary international law. The Sixth Circuit rejected this argument as well:

> The prohibition of the death penalty is not so extensive and virtually uniform among the nations of the world that it is a customary international norm. This is confirmed by the fact that large numbers of countries in the world retain the death penalty. Indeed, it is impossible to conclude that the

> international community as a whole recognizes the prohibition of the death penalty, when as of 2001, 147 states were parties to the International Covenant, which specifically recognizes the existence of the death penalty.

Id. at 373 (citations omitted).

The court additionally advised:

> We believe that in the context of this case, where customary international law is being used as a defense against an otherwise constitutional action, the reaction to any violation of customary international law is a domestic question that must be answered by the executive and legislative branches. We hold that the determination of whether customary international law prevents a State from carrying out the death penalty, when the State otherwise is acting in full compliance with the Constitution, is a question that is reserved to the executive and legislative branches of the United States government, as it [is] their constitutional role to determine the extent of this country's international obligations and how best to carry them out.

Id. at 375-76 (footnote omitted).

The authorities appear to be universal that no customary or international law or international treaty prohibits a state from imposing the death penalty as a punishment for certain crimes. See Stanford v. Kentucky, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989); United States v. Duarte-Acero, 296 F.3d 1277, 1283 (11th Cir. 2002) (International Covenant on Civil and Political Rights not binding on the federal courts because it is not self-executing and Congress has not passed legislation implementing it); Buell v. Mitchell, 274 F.3d 337 (6th Cir. 2001); United Mexican States v. Woods, 126 F.3d 1220, 1223 (9th Cir. 1997); Faulder v. Johnson, 99 F. Supp. 2d 774, 777 (S.D. Tex. 1999) (In signing Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and International Covenant on Civil and Political Rights, United States made reservation stating that it understood language to mean cruel and unusual punishment as defined by the Eighth Amendment, which does not prohibit the death penalty.); Workman v. Sundquist, 135 F. Supp. 2d 871 (M.D. Tenn. 2001); Jamison v. Collins, 100 F. Supp. 2d 647, 766 (S.D. Ohio 2000); People v. Ghent, 739 P.2d 1250 (Cal. 1987); State v. Kleypas, 40 P.3d 139 (Kan. 2001), cert. denied, __ U.S. __, __ S. Ct. __, __ L. Ed. 2d __ (2002); Domingues v. State, 961 P.2d 1279 (Nev. 1998); State v. Nelson, 715 A.2d 281 (N.J. 1998); State v. Phillips, 656 N.E.2d 643, 671 (Ohio 1995); Hinojosa v. State, 4 S.W.3d 240, 252 (Tex. Crim. App. 1999).

In his reply brief, the defendant presents the additional argument that the United States Senate cannot approve a treaty "with reservations." As he states, "[i]t has been assumed, without analysis under the separation of powers doctrine, that the Senate has the right to place conditions and reservations on the provisions of a treaty to which it gives its 'consent' under the Treaty Clause." He then cites three decisions of the United States Supreme Court which, by his interpretation, compel this result. We have carefully reviewed these authorities, Clinton v. City of New York, 524 U.S. 417, 438, 118 S. Ct. 2091, 2103, 141 L. Ed. 2d 393, 414 (1998) (line item veto held invalid because the Constitution does not authorize the President "to enact, to amend, or to repeal statutes"); Bowsher v. Synar, 478 U.S. 714, 736, 106 S. Ct. 3181, 3193, 92 L. Ed. 2d 583, 603 (1986) ("[T]he powers vested in the Comptroller General under § 251 [of the

balanced budget and Deficit Control Act of 1985] violate the command of the Constitution that the Congress play no direct role in the execution of the laws."); and INS v. Chadha, 462 U.S. 919, 954-55, 103 S. Ct. 2764, 2785-86, 77 L. Ed. 2d 317, 346-47 (1983) (congressional veto provision in section 244(c)(2) of the Immigration and Nationality Act, allowing one house of Congress to invalidate a decision of the Executive Branch, determined to be unconstitutional). While these three decisions all deal with separation of power issues, we respectfully disagree with the defendant's assertions that their rationales compel the conclusion that the United States Senate cannot approve a treaty "with reservations." In fact, a determination that the Senate can do so is implicit in the numerous other decisions considering defendants' treaty-based attacks on the imposition of capital punishment. See Coleman v. Mitchell, 268 F.3d 417, 443 n.12 (6th Cir. 2001), cert. denied, __ U.S. __, 122 S. Ct. 1639, 152 L. Ed. 2d 647 (2002) ("'[T]he United States is not party to any treaty that prohibits capital punishment per se.'") (quoting United States v. Bin Laden, 126 F. Supp. 2d 290, 294 (S.D.N.Y. 2001)). Thus, we respectfully disagree that the authorities cited by the defendant support his claim that the Treaty Clause of the United States Constitution prevents the Senate from approving a treaty with reservations.

Accordingly, we conclude that this assignment is without merit.

VII. Constitutionality of Tennessee Death Penalty Statutes

The defendant raises numerous challenges to the constitutionality of Tennessee's death penalty provisions. Included within his challenge that the Tennessee death penalty statutes violate the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and Article I, Sections 8, 9, 16, and 17, Article II, Section 2, and Article XI, Section 8, of the Tennessee Constitution are the following:

> **A. Tennessee's death penalty statutes fail to meaningfully narrow the class of death eligible defendants; specifically, the statutory aggravating circumstances set forth in Tennessee Code Annotated section 39-13-204(i)(2), (i)(5), (i)(6), and (i)(7) have been so broadly interpreted, whether viewed singly or collectively, that they fail to provide such a "meaningful basis" for narrowing the population of those convicted of first degree murder to those eligible for the sentence of death.[1]**

As to this claim, the defendant asserts in his brief that our supreme court ruled incorrectly in State v. Caldwell, 671 S.W.2d 459 (Tenn. 1984), and State v. Blouvett, 904 S.W.2d 111 (Tenn. 1995), arguing that application of these holdings results in an overbroad construction of Tennessee Code Annotated section 39-13-204(i)(2) and violates his right to substantive due process. Thus, he invites this court to reconsider these decisions. However, this court, being inferior to our supreme court, is bound by its decisions and must abide with its "order, decrees and precedents." State v. Irick, 906 S.W.2d 440, 443 (Tenn. 1995). Applying the holdings of our supreme court in Caldwell and Blouvett, we conclude that this assignment is without merit.

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[1] We note that factors (i)(5), (i)(6), and (i)(7) do not pertain to this case as they were not relied upon by the State. Thus, any individual claim with respect to these factors is without merit. See, e.g., State v. Hall, 958 S.W.2d 679, 715 (Tenn. 1997); State v. Brimmer, 876 S.W.2d 75, 87 (Tenn. 1994).

B. The death sentence is imposed capriciously and arbitrarily in that:

(1) unlimited discretion is vested in the prosecutor as to whether or not to seek the death penalty, and

(2) it is imposed in a discriminatory manner based upon economics, race, geography, and gender.

These arguments have been rejected on numerous occasions by our supreme court. See State v. McKinney, 74 S.W.3d 291, 319 (Tenn.), cert. denied, __ U.S. __, __ S. Ct. __, __ L. Ed. 2d __ (2002).

(3) there are no uniform standards or procedures for jury selection to insure open inquiry concerning potentially prejudicial subject matter.

This argument has been rejected by our supreme court. See State v. Caughron, 855 S.W.2d 526, 542 (Tenn.), cert. denied, 510 U.S. 979, 114 S. Ct. 475, 126 L. Ed. 2d 426 (1993).

(4) the death qualification process skews the make-up of the jury and results in a relatively prosecution-prone guilt-prone jury.

This argument, likewise, has been rejected. See State v. Teel, 793 S.W.2d 236, 246 (Tenn.), cert. denied, 498 U.S. 1007, 111 S. Ct. 571, 112 L. Ed. 2d 577 (1990); State v. Harbison, 704 S.W.2d 314, 318 (Tenn.), cert. denied, 476 U.S. 1153, 106 S. Ct. 2261, 90 L. Ed. 2d 705 (1986).

(5) defendants are prohibited from addressing jurors' popular misconceptions about matters relevant to sentencing, i.e., the cost of incarceration versus cost of execution, deterrence, method of execution, and parole eligibility.

This argument has been rejected by our supreme court. See Terry v. State, 46 S.W.3d 147, 170 (Tenn.), cert. denied, __ U.S. __, 122 S. Ct. 553, 151 L. Ed. 2d 428 (2001); Brimmer, 876 S.W.2d at 86-87; State v. Cazes, 875 S.W.2d 253, 268 (Tenn. 1994); State v. Black, 815 S.W.2d 166, 179 (Tenn. 1991).

(6) the jury is instructed that it must agree unanimously in order to impose a life sentence, and is prohibited from being told the effect of a nonunanimous verdict.

This argument has been rejected by our supreme court. See Terry, 46 S.W.3d at 170; Brimmer, 876 S.W.2d at 87; Cazes, 875 S.W.2d at 268; State v. Smith, 857 S.W.2d 1, 22-23 (Tenn. 1993).

(7) requiring the jury to agree unanimously to a life verdict violates Mills v. Maryland[2] and McKoy v. North Carolina.[3]

This argument has been rejected by our supreme court. See Brimmer, 876 S.W.2d at 87; State v. Thompson, 768 S.W.2d 239, 250 (Tenn. 1989); State v. King, 718 S.W.2d 241, 249 (Tenn. 1986), superseded by statute as recognized by State v. Hutchinson, 898 S.W.2d 161 (Tenn. 1994).

(8) there is a reasonable likelihood that jurors believe they must unanimously agree as to the existence of mitigating circumstances because of the failure to instruct the jury on the meaning and function of mitigating circumstances.

This argument has been rejected. See State v. Keen, 31 S.W.3d 196, 233 (Tenn. 2000), cert. denied, 532 U.S. 907, 121 S. Ct. 1233, 149 L. Ed. 2d 142 (2001); Thompson, 768 S.W.2d at 251-52.

(9) the jury is not required to make the ultimate determination that death is the appropriate penalty.

This argument has been rejected by our supreme court. See Brimmer, 876 S.W.2d at 87; Smith, 857 S.W.2d at 22.

(10) the defendant is denied final closing argument in the penalty phase of the trial.

This argument has been rejected. See Brimmer, 876 S.W.2d at 87; Cazes, 875 S.W.2d at 269; Smith, 857 S.W.2d at 24; Caughron, 855 S.W.2d at 542.

(11) permitting a capital defendant to waive introduction of mitigation evidence without permitting such evidence to be placed in the record for purposes of proportionality review renders the Tennessee death penalty statutes unconstitutional.

Since the defendant presented mitigating evidence during the penalty phase, this claim appears to be irrelevant to his appeal. The Supreme Court of the United States does not require a defendant to present mitigating evidence; rather, statements by the Court regarding the ability of a defendant to present such evidence are phrased permissively. See, e.g., Blystone v. Pennsylvania, 494 U.S. 299, 307 n.5, 110 S. Ct. 1078, 1083, n.5, 108 L. Ed. 2d 255 (1990); McCleskey v. Kemp, 481 U.S. 279, 305-06, 107 S. Ct. 1756, 1774-75, 95 L. Ed. 2d 262 (1987); Skipper v. South Carolina, 476 U.S. 1, 8, 106 S. Ct. 1669, 1672-73, 90 L. Ed. 2d 1 (1986); Eddings v. Oklahoma, 455 U.S. 104, 113-14, 102 S. Ct. 869, 876-77, 71 L. Ed. 2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 2964-65, 57 L. Ed. 2d 973 (1978). Further, the Eighth Amendment and evolving standards of decency neither require nor demand that an unwilling defendant present an affirmative penalty defense in a capital case. See State v. Smith, 993 S.W.2d 6, 13-14 (Tenn. 1999).

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[2] 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988).

[3] 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

This assignment is irrelevant to the defendant's case but, even if it were relevant, it is without merit.

(12) mandatory introduction of victim impact evidence and of other crime evidence upon prosecutor's request violates separation of powers and injects arbitrariness and capriciousness into capital sentencing.

Tennessee Code Annotated section 39-13-204(c) provides that a trial court "shall" permit a victim's representative to testify before the jury in sentencing, and the defendant asserts that "[t]his legislation improperly infringes upon a trial court's power to conduct proceedings and is thus a violation of separation of powers." Additionally, he argues that the legislative mandate and the supreme court's decision in State v. Nesbit, 978 S.W.2d 872 (Tenn. 1998), "render death sentencing in Tennessee unconstitutional since this factor is rife with discrimination and violates equal protection guarantees of the state and federal constitutions."

Initially, as to the defendant's criticism of our supreme court's holding in Nesbit, we respectfully decline to review this decision because, being an intermediate court, we are without authority to overturn it, as the defendant apparently invites us to do. However, we will review the defendant's complaint as to the language in Tennessee Code Annotated section 39-13-204(c), permitting testimony at the sentencing hearing "about the impact of the murder on the family of the victim and other relevant persons."

As our supreme court explained in State v. McKinney, 74 S.W.3d 291 (Tenn. 2002), neither the United States nor the Tennessee Constitution precludes the introduction of "victim impact" evidence:

> The introduction of "victim impact" evidence and prosecutorial argument is not precluded by either the United States Constitution or the Tennessee Constitution in a capital sentencing proceeding. See Payne v. Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597, 2609, 115 L. Ed. 2d 720 (1991); State v. Nesbit, 978 S.W.2d 872, 889 (Tenn. 1998). As the United States Supreme Court has explained:
>
> > We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, *so too the victim is an individual whose death represents a unique loss to society and in particular to his family*."

Id. at 308-09 (quoting Payne v. Tennessee, 501 U.S. at 825, 111 S. Ct. at 2608 (alteration in original) (emphasis added)).

Thus, it is clear that this statute does not make admissible that which, otherwise, would be proscribed.

We now will review the defendant's claim that this statute violates the separation of powers. Initially, we note that the defendant has provided no legal authorities in support of this proposition.

In State v. Mallard, 40 S.W.3d 473, 481 (Tenn. 2001), our supreme court discussed the roles of the General Assembly and the court regarding rules of evidence and procedure to be employed in court proceedings, recognizing that circumstances arise where it is impossible to perfectly preserve the "'theoretical lines of demarcation between the executive, legislative and judicial branches of government.'" Id. (quoting Petition of Burson, 909 S.W.2d 768, 774 (Tenn. 1995)). Noting the interdependency of the three branches of government, the court acknowledged the "broad power of the General Assembly to establish rules of evidence in furtherance of its ability to enact substantive law." Id. (citing Daugherty v. State, 216 Tenn. 666, 393 S.W.2d 739, 743 (1965)). However, the legislature's enactment of rules for use in the courts of this state is confined to those areas that are appropriate to the exercise of that power. Id. Additionally, the court acknowledged the judiciary's acceptance of procedural or evidentiary rules promulgated by the General Assembly where the legislative enactments (1) are reasonable and workable within the framework already adopted by the judiciary, and (2) work to supplement the rules already promulgated by the Supreme Court. Id. (citing Newton v. Cox, 878 S.W.2d 105, 112 (Tenn. 1994)). In so holding, the court stated that "[t]his Court has long held the view that comity and cooperation among the branches of government are beneficial to all, and consistent with constitutional principles, such practices are desired and ought to be nurtured and maintained." Id.

As of the effective date of the amendment, our supreme court had not yet filed its decision in Nesbit, which was decided and released on September 28, 1998, and held that Tennessee's capital sentencing statute authorizes the admission of victim impact evidence as "one of those myriad factors encompassed within the statutory language *nature and circumstances of the crime*." 978 S.W.2d at 890.

We interpret the legislature's action in amending Tennessee Code Annotated section 39-13-204(c) as supplementing the operation of the Rules of Evidence. The use of the word "shall" is generally mandatory, but in the present context is not inflexible. The statute does not indicate what weight should be given to the evidence nor does it indicate what sentence should be imposed. Moreover, regarding victim impact, the statute provides that the jury "may" consider said evidence. Consequently, the contested language does not impermissibly infringe upon the powers of the court.

Our conclusion is advocated by the position of our supreme court which made clear that "the rules of evidence do not limit the admissibility of evidence in a capital sentencing proceeding." State v. Stout, 46 S.W.3d 689, 702 (Tenn.), cert. denied, __ U.S. __, 122 S. Ct. 471, 151 L. Ed. 2d 386 (2001) (citing Van Tran v. State, 6 S.W.3d 257, 271 (Tenn. 1999)). The court interpreted section 39-13-204(c) as permitting "'trial judges wider discretion than would normally be allowed under the Tennessee Rules of Evidence in ruling on the admissibility of evidence at a capital sentencing hearing.'" Id. at 703 (quoting State v. Sims, 45 S.W.3d 1, 14 (Tenn. 2001)). To further explain the supreme court's acceptance of the legislature's action in this area, we restate the following principles adopted by our supreme court in Sims:

> The Rules of Evidence should not be applied to preclude introduction of otherwise reliable evidence that is relevant to the issue of punishment, as it relates to mitigating or aggravating circumstances, the nature and circumstances of the particular crime, or the character and background of the individual defendant. As our case history reveals, however, the discretion

> allowed judges and attorneys during sentencing in first degree murder cases is not unfettered. Our constitutional standards require inquiry into the reliability, relevance, value, and prejudicial effect of sentencing evidence to preserve fundamental fairness and protect the rights of both the defendant and the victim's family. The rules of evidence can in some instances be helpful guides in reaching these determinations of admissibility. Trial judges are not, however, required to adhere strictly to the rules of evidence. These rules are too restrictive and unwieldy in the arena of capital sentencing.

45 S.W.3d at 14.

Accordingly, we conclude that the 1998 amendment to Tennessee Code Annotated section 39-13-204(c) does not violate the separation of powers clauses of either the Constitution of the State of Tennessee or the Constitution of the United States of America.

This assignment is without merit.

C. The appellate review process in death penalty cases is constitutionally inadequate.

This argument has been rejected by our supreme court. See Cazes, 875 S.W.2d at 270-71; Harris, 839 S.W.2d at 77.

[Deleted: VIII. Review Pursuant to Tennessee Code Annotated section 39-13-206(c)]

IX. Cumulative Error

The defendant asserts that this court should not consider in isolation any errors that we deem harmless. He further argues that the cumulative effect of such errors could and did result in the violation of his right to due process. However, because we do not find multiple errors to be combined for consideration, this issue lacks merit.

[Deleted: Conclusion]

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ALAN E. GLENN, JUDGE